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No. 07-859

FILED
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SUPREME COURT, U.S.

IN THE
Supreme Court of the United States

CHEMJECT INTERNATIONAL, INC.,
Petitioner,
v.

SOUTHWESTERN BELL TELEPHONE COMPANY,
JOSE MIRELES, AND PATRICIA GENUCHI,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of Texas, Thirteenth District

BRIEF IN OPPOSITION FOR SOUTHWESTERN BELL TELEPHONE COMPANY

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QUESTIONS PRESENTED

1. Whether a Texas intermediate appellate court properly rejected petitioner's due process claim because petitioner had failed to explain why a separate state-law procedure did not provide an adequate mechanism to raise its arguments.

2. Whether petitioner has waived its other issues, which were not presented or addressed below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Southwestern Bell Telephone Company states the following:

Southwestern Bell Telephone Company is a wholly owned, indirect subsidiary of AT&T Inc. AT&T Inc. has no parent corporation. No publicly held company owns 10% or more of AT&T Inc.'s stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE 2

1. This Suit Is Filed and Settled, and the Trial Court and Court of Appeals Approve the Settlement 2

2. After the Court of Appeals Approved the Settlement, Petitioner Attempts an Untimely Intervention in the Litigation 6

3. Petitioner Also Initiates a Separate Proceeding Attacking the Judgment Approving the Settlement 9

4. The Court of Appeals Upholds the Orders Denying Petitioner's Untimely Attempt To Intervene and Its Attack on the Judgment 10

REASONS FOR DENYING THE PETITION 11

I. PETITIONER'S DUE PROCESS CLAIM DOES NOT WARRANT REVIEW 11

II. PETITIONER WAIVED THE OTHER ISSUES MENTIONED IN THE PETITION 22

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

Adams v. Robertson, 520 U.S. 83 (1997) 22, 23

Baxstrom v. Herold, 383 U.S. 107 (1966) 23

Bowles v. Russell, 127 S. Ct. 2360 (2007) 21

Caldwell v. Barnes, 154 S.W.3d 93 (Tex. 2004) 9

City of San Benito v. Rio Grande Valley Gas Co., 109 S.W.3d 750 (Tex. 2003) 5

Devlin v. Scardelletti, 536 U.S. 1 (2002) 5

Dixon v. Love, 431 U.S. 105 (1977) 13

First Alief Bank v. White, 682 S.W.2d 251 (Tex. 1984) 6

Gates v. Cook, 234 F.3d 221 (5th Cir. 2000) 18, 19

Griffin v. Illinois, 351 U.S. 12 (1956) 21

Howell v. Mississippi, 543 U.S. 440 (2005) 22, 23

Kortebein v. American Mutual Life Ins. Co., 49 S.W.3d 79 (Tex. App. 2001) 19, 20

McKane v. Durston, 153 U.S. 684 (1894) 21

M.L.B. v. S.L.J., 519 U.S. 102 (1996) 21

Moser v. Roberts, 185 S.W.3d 912 (Tex. App. 2006) 22

Mullaney v. Wilbur, 421 U.S. 684 (1975) 12

National Union of Marine Cooks & Stewards v. Arnold, 348 U.S. 37 (1954) 21

Northrup v. Southwestern Bell Tel. Co.:

72 S.W.3d 1 (Tex. App. 2001) 5

72 S.W.3d 16 (Tex. App. 2002) 3, 5, 6, 14, 19

Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) 14

Peralta v. Heights Med. Ctr., Inc., 485 U.S. 80 (1988) 13

Perez v. Rent-A-Center, Inc., 892 A.2d 1255, *clarified on denial of recon.*, 902 A.2d 1232 (N.J. 2006), *cert. denied*, 127 S. Ct. 984 (2007) 17

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 13, 14

United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977) 19

VMS Sec. Litig., In re, 145 F.R.D. 458 (N.D. Ill. 1992), *aff'd in part, vacated in part*, 21 F.3d 139 (7th Cir. 1994) 20

Wisniewski v. United States, 353 U.S. 901 (1957) 20

CONSTITUTION AND RULES

U.S. Const.:

Amend. I 18

Amend. XIV 22

Due Process Clause 19

Equal Protection Clause 22

Fed. R. App. P. 4(a)(1)(A) 21

Fed. R. Civ. P. 23 5

Sup. Ct. R.:

Rule 10 20

Rule 14.4 22

Tex. R. App. P.:

Rule 26.1 21

Rule 38.1(h) 22

INTRODUCTION

The petition raises no issue meriting review by this Court. The Texas intermediate appellate court rejected petitioner's due process argument because petitioner had not explained why a separate state-law mechanism was not an adequate avenue for petitioner, an absent member of the class, to bring a post-judgment attack on an approved class-action settlement. The correctness of the Texas court's determination as to whether petitioner had adequately addressed that state-law issue does not merit plenary review by this Court; nor is review warranted as to whether, as a matter of Texas law, the other procedural mechanism would be available on the specific facts of this case.

Beyond that, petitioner can identify no precedent from this Court or any other court establishing, on anything like the unusual facts of this case, that its due process rights were denied here. Simply put, no case establishes that an unnamed class member, having received adequate notice before a settlement is approved, has a due process right to seek to set aside that settlement at any time years later. There is thus no division of authority even arguably warranting review in this case.

Petitioner's other arguments were not even raised below and thus are not properly presented here.

STATEMENT OF THE CASE

1. This Suit Is Filed and Settled, and the Trial Court and Court of Appeals Approve the Settlement

a. In July 1998, two customers of Southwestern Bell's local telephone service (respondents here) sued Southwestern Bell in Texas state court on behalf of themselves and a class of similarly situated consumers. *See* Pet. App. 4. The suit challenged Southwestern Bell's practice of collecting municipal fees from customers of its local telephone service. *See id.* at 96. Southwestern Bell paid those fees to municipalities to compensate them for Southwestern Bell's use of public rights of way. *See id.* According to the complaint, Southwestern Bell's tariffs did not permit it to pass on to its customers the full amount of the fees in all circumstances. *See id.* at 96-97. Southwestern Bell disputed the complaint's allegations, explaining that both its tariffs and Texas law authorized its conduct. *See id.* at 97.

In December 1999, to avoid a protracted and costly legal battle, the parties entered into an agreement to resolve the dispute. *See id.* at 4. Even if the plaintiffs ultimately had prevailed in the litigation, the amount of any individual class member's damages likely would have been insignificant, and ascertaining the amount owed each class member would have been an unduly burdensome and expensive endeavor. *See id.* at 43, 46-47, 75, 98, 100. Accordingly, Southwestern Bell agreed to create a settlement fund worth $10 million in cash and services. *See id.* at 25, 72-73, 81-82. The proceeds of the fund (less deductions for fees and expenses) were to be provided to the Texas Telecommunications Infrastructure Fund Board to support the Texas Internet Collaborative

Community Network Plan – an effort "to provide online Internet-based community information and resource networks for Texas communities." *Id.* at 74; *see id.* at 81-83, 101-03.[1]

b. The trial court conditionally certified the settlement class and preliminarily approved the settlement. *See* Pet. App. 4. It also reviewed and approved the form and content of the notice informing the class members of (i) the suit, (ii) the terms of the settlement, and (iii) their rights to opt out of the class or object to the settlement, and to appear at a fairness hearing. *See id.*; *see also id.* at 95-110. The notice was mailed to class members as an insert in their monthly bills from Southwestern Bell and published in major newspapers throughout Texas on two separate dates. *See Northrup v. Southwestern Bell Tel. Co.*, 72 S.W.3d 16, 19 (Tex. App. 2002) ("*Northrup II*").

Petitioner received that notice and neither opted out of the class nor objected to the settlement. *See* Pet. App. 4. The trial court held a two-day class-certification and fairness hearing, which petitioner did not attend. *See id.* A small number of other unnamed class members did file objections to the settlement. *See id.* One of the objectors was an entity called Southwestern Tariff Analyst, which was

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[1] Petitioner inaccurately suggests that $1.25 million of the $10 million settlement amount was "paid" to Southwestern Bell for administrative expenses. Pet. 3; *see also* Pet. ii n.2. Although the settlement agreement permitted Southwestern Bell to offset the settlement payment by up to $1.25 million for costs incurred in providing notice to the class, *see* Pet. App. 81-82, those costs in fact amounted to less than $400,000, *see id.* at 38-39.

represented by two lawyers who also are counsel for petitioner in this Court. *See id.* at 27.

c. In May 2000, the trial court overruled the objections to the settlement, certified the settlement class, and entered a final judgment approving the settlement. *See* Pet. App. 34-41. In so doing, the court made numerous findings of fact concerning the fairness of the settlement. *See id.* at 42-50. In particular, the court found that the notice provided to the class "was the best notice practicable under the circumstances," including "individual notice to all members of the Settlement Class who could be identified through reasonable effort." *Id.* at 44. It found that the class notice "fairly and accurately" informed the class members of "the nature of the suit" and advised them that they had a right to opt out, that the judgment approving the settlement would bind all class members who did not opt out, and that any class member "could enter an appearance through counsel or otherwise object to the settlement." *Id.* at 45.

The trial court further found the consideration provided by Southwestern Bell – a $10 million settlement fund – to be "fair, appropriate, adequate, and the best way to compensate the Settlement Class under the circumstances." *Id.* at 46. The court explained that "it would be extraordinarily difficult, if not impossible, to identify many of the specific members of the Settlement Class" and that, "even if individual members were identified, the administrative costs in verifying the amounts that such members had paid to [Southwestern Bell] would almost certainly exceed any individual recovery." *Id.* The court also noted that, because Southwestern Bell "had numerous, substantial defenses to the merits of"

the plaintiffs' claims, *id.*, and the plaintiffs would incur "substantial" costs in litigating the claims, *id.* at 47, there was a "real possibility that the Settlement Class would receive nothing if the Action were litigated," *id.*

d. Two of the objectors appealed. *See* Pet. App. 4. Before reaching the merits of the appeal, the Texas court of appeals held, as a matter of first impression under Texas law, that unnamed class members who did not intervene in the litigation can appeal a judgment that both certifies a settlement class and approves a settlement. *See Northrup v. Southwestern Bell Tel. Co.*, 72 S.W.3d 1, 10-12 & n.17 (Tex. App. 2001) ("*Northrup I*").[2]

In February 2002, the Texas court of appeals issued its opinion upholding the trial court's approval of the settlement. *See Northrup II*, 72 S.W.3d 16. Specifically, it rejected the claim that the form of the class notice was defective, affirming the trial court's finding that the combination of mailings and publication employed "was the 'best notice practicable' for advising the unnamed class members of the pendency of the class action." *Id.* at 19. The court also concluded that the content of the notice fully complied with the Texas analogue to Federal Rule of Civil Procedure 23. *See id.* at 20. The court further held that the notice properly informed the class members about class counsel's fees. *See id.* at 20-21.

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[2] *See also City of San Benito v. Rio Grande Valley Gas Co.*, 109 S.W.3d 750, 752 (Tex. 2003) ("an unnamed class member is not required to intervene in order to appeal its objections to a class settlement"); *Devlin v. Scardelletti*, 536 U.S. 1, 14 (2002) (holding that, under federal law, an unnamed class member who objects in the trial court to the approval of a settlement can appeal without intervening).

Turning to the objectors' complaints about the fairness of the settlement, the court of appeals reviewed the record from the fairness hearing and concluded that "the trial court based its approval of the settlement on consideration of the appropriate factors." *Id.* at 21. In particular, the record showed that "determining the exact amount of damages for each individual plaintiff would be time-consuming and excessively difficult" and that "the amount that would likely be owed to each plaintiff would have been very small – *i.e.*, around *one dollar*." *Id.* (emphasis added).

In May 2002, the two objectors each filed a petition for review in the Supreme Court of Texas.

2. After the Court of Appeals Approved the Settlement, Petitioner Attempts an Untimely Intervention in the Litigation

a. In March 2003, while the objectors' petitions for review remained pending in the Supreme Court of Texas (and almost three years after the trial court approved the settlement), petitioner attempted to intervene in the trial court by filing a motion to set aside the judgment and a petition in intervention. In support of those pleadings, petitioner alleged that it had received information (from Southwestern Tariff Analyst, the entity petitioner's counsel had represented in objecting to the settlement) indicating that the settlement was tainted by fraud. *See* Pet'r Ct. App. Br. 5. Southwestern Bell opposed petitioner's efforts, explaining that the trial court lacked jurisdiction to set aside the judgment or allow intervention more than 30 days after judgment. *See, e.g., First Alief Bank v. White*, 682 S.W.2d 251, 252 (Tex. 1984) (per curiam) (holding that "a plea in intervention comes too late if filed after judgment and may not be

considered unless and until the judgment has been set aside" and that a trial court "lack[s] jurisdiction to modify [a] judgment" more than 30 days after it is entered). The trial court initially took no action regarding petitioner's attempted intervention. *See* Pet. App. 5-6.

b. In the summer of 2003, the Governor of Texas eliminated the Texas Telecommunications Infrastructure Fund Board – the entity designated in the settlement agreement to receive the proceeds of the settlement fund. *See* Pet. App. 60, 62-65. The Board's primary function during its existence had been to provide and administer funding grants to entities for use in improving telecommunications infrastructure in Texas. *See id.* at 62. The Governor assigned the Board's functions to the Texas Workforce Commission. *See id.* at 63. Petitioner amended its motion to set aside the judgment to assert that the elimination of the Telecommunications Infrastructure Fund Board rendered the settlement agreement void. *See* Pet. 4-5.

c. In September 2003, the Supreme Court of Texas granted one of the objectors' petitions for review of the court of appeals' decision affirming the approval of the settlement agreement (that court had earlier denied the other petition). During briefing in the Texas high court, petitioner submitted two briefs *amicus curiae* and one motion to abate the appeal, raising, among other things, the same claim that it asserts here (namely, that the Texas Governor's elimination of the Telecommunications Infrastructure Fund Board requires overturning the judgment approving the settlement).[3] One of those briefs was

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[3] *See* Brief of Amicus Curiae Chemject Int'l, Inc. at 2, *Northrup v. Southwestern Bell Tel. Co.*, No. 02-0444 (Tex. filed

filed in response to a court order specifically directing the parties to address whether the case should be remanded to the trial court for reconsideration in light of the elimination of the Telecommunications Infrastructure Fund Board. In January 2004, after having an opportunity to consider fully the implications of the elimination of the Telecommunications Infrastructure Fund Board, the Supreme Court of Texas dismissed the objector's petition as improvidently granted. *See* Pet. App. 5.

d. With appellate review of the settlement complete, Southwestern Bell and the class representatives jointly moved the trial court to establish a settlement administration. *See* Pet. App. 6. The parties' motion provided for the appointment of a settlement administrator and set forth detailed procedures for transferring the settlement amount to the Texas Workforce Commission (the successor to the Telecommunications Infrastructure Fund Board) to be used to support the Texas Internet Collaborative Community Network Plan, as described in the settlement agreement. The trial court granted that motion. *See id.* at 32-33; *see also id.* at 30-31.[4]

In July 2004, petitioner filed a motion for reconsideration of the order establishing a settlement

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May 20, 2003); Unnamed Class Member Chemject Int'l, Inc.'s Emergency Mot. To Abate This Appeal at 2-4, *Northrup v. Southwestern Bell Tel. Co.*, No. 02-0444 (Tex. filed Sept. 5, 2003); Brief of Amicus Curiae Chemject Int'l, Inc. in Response to the Questions Posed by the Court at 4-5, 6, *Northrup v. Southwestern Bell Tel. Co.*, No. 02-0444 (Tex. filed Nov. 15, 2003).

[4] Southwestern Bell has paid the full settlement amount (less fees and expenses) to the Texas Workforce Commission, which is using the settlement payment to implement the Texas Internet Collaborative Community Network Plan.

administration. *See id.* at 6. The trial court did not rule on petitioner's motion for reconsideration. Instead, in September 2004, the court entered an order rejecting petitioner's attempt to intervene and to set aside the judgment, explaining that it lacked jurisdiction to grant petitioner's requests. *See id.* at 29. Petitioner appealed. *See id.* at 6.

3. Petitioner Also Initiates a Separate Proceeding Attacking the Judgment Approving the Settlement

In May 2004, while petitioner's petition in intervention and motion to set aside the judgment were pending in the trial court, petitioner initiated a separate proceeding attacking the judgment approving the settlement agreement. Petitioner filed a petition for bill of review, purportedly on behalf of itself and a class of Southwestern Bell customers. *See* Pet. App. 6. A bill of review is "an equitable proceeding brought by a party seeking to set aside a prior judgment." *Caldwell v. Barnes*, 154 S.W.3d 93, 96 (Tex. 2004) (per curiam).

In the petition for bill of review, petitioner alleged that the judgment approving the settlement should be set aside because Southwestern Bell and the class representatives had made false representations to the trial court and the class in securing approval of the settlement. *See* Pet. App. 7. In October 2004, Southwestern Bell and the class representatives moved for summary judgment, contending that petitioner had not put forth evidence to support its allegations. The trial court granted that motion and denied the bill of review with prejudice. *See id.* Petitioner appealed.

4. The Court of Appeals Upholds the Orders Denying Petitioner's Untimely Attempt To Intervene and Its Attack on the Judgment

In the decision under review, the Texas court of appeals issued a single opinion disposing of both petitioner's appeal of the denial of its attempt to intervene and set aside the judgment in the underlying class action and its appeal of the denial of the bill of review. *See* Pet. App. 3-28.

As to the former, the court of appeals held that the trial court did not err in refusing petitioner's attempt to intervene, because the lower court lacked jurisdiction to permit the intervention. *See id.* at 8-9. The court also noted that petitioner had argued, "without supporting authority, that the striking of its petition in intervention would constitute a due process violation." *Id.* at 10. The court rejected that notion, explaining that petitioner had failed to offer any reason "why the bill of review" proceeding that it had filed did "not satisfy its due process needs." *Id.* at 10-11. In addition, the court ruled that, insofar as petitioner sought to have its appeal (which it filed in October 2004) construed as an appeal of the trial court's May 2000 judgment approving the settlement agreement, the appeal was untimely (by several years). *See id.* at 9-10.

Turning to petitioner's appeal of the denial of its petition for bill of review, the court of appeals concluded that petitioner had not demonstrated fraud justifying setting aside the judgment approving the settlement. *See id.* at 15-19. Petitioner also contended that, to the extent that the misrepresentations it had alleged did not satisfy the requirements for setting aside the judgment in a bill of review proceeding, the denial of the bill of review violated its

and the other unnamed class members' due process and equal protection rights. *See id.* at 21-22. The court of appeals found, however, that petitioner had "raised these constitutional issues for the first time on appeal" and that, therefore, "they are waived." *Id.* at 22. Thus, the court affirmed the denial of the petition for bill of review. *See id.* at 24.

Petitioner filed separate petitions for review in the Supreme Court of Texas challenging the intermediate appellate court's decisions. That court denied both of those petitions. Petitioner has not sought further review of the denial of its petition for bill of review. *Cf.* Pet. 35 & n.8.

REASONS FOR DENYING THE PETITION

I. PETITIONER'S DUE PROCESS CLAIM DOES NOT WARRANT REVIEW

Petitioner's principal claim is that due process required the Texas courts to allow it to intervene and to seek to set aside the judgment approving the settlement agreement after the elimination of the Telecommunications Infrastructure Fund Board. *See* Pet. i (Question 1(a)). That claim does not warrant review.

A. As an initial matter, the Texas courts did not find that petitioner lacked any avenue to challenge the settlement even though it first sought to intervene to attack the agreement three years after judgment. To be sure, as explained by the Texas intermediate appellate court, the trial court lost "plenary jurisdiction" no later than 105 days after it entered judgment in May 2000. Pet. App. 9. But that holding did not necessarily mean that petitioner could not be heard even at that late date. As the Texas appellate court explained, "Chemject filed a separate bill

of review proceeding," but never "explained why the bill of review [proceeding] does not satisfy its due process needs." *Id.* at 10-11. It was the potential availability of that separate proceeding under state law – an issue that, the Texas appellate court made clear, petitioner had not addressed – that led the court to conclude that petitioner's due process argument was "not persuasive." *Id.* at 11.

The dispositive point to the Texas appellate court was thus one of state law and, more specifically, the fact that petitioner had failed to address a significant issue of state law relevant to its due process arguments. That case-specific determination involving which state-law arguments had been adequately addressed in appellate proceedings raises no general federal-law concern meriting review by this Court. *See, e.g., Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) ("This Court . . . repeatedly has held that state courts are the ultimate expositors of state law and that we are bound by their constructions except in extreme circumstances[.]") (citations omitted).

Petitioner takes issue with the Texas court's analysis of state law, suggesting that, because it allegedly seeks "*enforcement*" of the judgment, a bill of review proceeding would not be the proper procedure under Texas law. *See* Pet. 31-35. As a threshold matter, that assertion does not address what the Texas court found to be petitioner's failure adequately to explain in its appellate presentation why the bill of review proceeding would be inadequate. Beyond this, the proper scope of a bill of review proceeding obviously is a state-law issue that does not warrant plenary review. Presumably recognizing this fact, petitioner does not challenge the denial of the bill of review. That failure further undermines petitioner's due

process claim. *Cf. Dixon v. Love*, 431 U.S. 105, 113-14 (1977) (additional process would not help avoid error where validity of underlying decisions had not been challenged on appeal). In all events, as discussed below, *see infra* Part I.C.1, even on the merits, petitioner's state-law argument depends on the mistaken premise that it was seeking to enforce the judgment, not, as is in fact the case, set it aside. When that premise is corrected, petitioner's argument fails even as to state law.

Petitioner cites (at 33-34) *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1988), in support of its position, but that case simply holds that a party that had not received proper notice of a prior action in which a default judgment was entered against it could not be required to show a "meritorious defense" to maintain a bill of review proceeding. *See id.* at 86. There is no dispute here that petitioner received legally adequate notice before judgment was entered. *See* Pet. App. 44-45. Thus, to the extent *Peralta* is relevant here, it is because it reiterates the Court's "disinclin[ation] to become involved in resolving disputes about [state] law that should have been presented to the state courts," 485 U.S. at 86, not for any principle of due process law.

B. Even aside from these dispositive case-specific points of state law, review is not warranted here because petitioner identifies no authority supporting its claim that its due process rights were violated on the facts of this case. Thus, there is no conflict between the decision below and the decisions of this Court or the decisions of any federal appellate court or state supreme court.

In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), this Court articulated the due process rights

of absent class members. The right that petitioner claims – a right to seek to set aside a settlement years after it has been approved – is not one of those identified by the Court. *Shutts* was a state class action for small sums of interest on royalty payments suspended on the authority of a federal regulation. *Id.* at 800. This Court held that, before a state court can "bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection." *Id.* at 811-12 (footnote omitted). Unnamed class members must receive "notice plus an opportunity to be heard and participate in the litigation," as well as "an opportunity to remove [themselves] from the class." *Id.* at 812. Further, the class representatives must "adequately represent the interests of the absent class members." *Id.*; *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 847-48 (1999) (reiterating the *Shutts* requirements).

Here, the "minimal" due process requirements set forth in *Shutts* were fully satisfied. The Texas courts found (and petitioner does not dispute) that petitioner, along with its fellow class members, received notice of (i) the suit, (ii) the terms of the settlement, and (iii) the rights to opt out of the class or object to the settlement, and to appear at a fairness hearing. *See* Pet. App. 44-45; *Northrup II*, 72 S.W.3d at 19-20. In addition, the trial court found that the class representatives adequately represented the interests of the unnamed class members (including petitioner). *See* Pet. App. 43. Thus, petitioner received all of the process to which it was entitled under this Court's cases, and it cites no cases to the contrary.

Indeed, petitioner cites no case from *any* court establishing the proposition that an unnamed class

member is entitled as a matter of due process to attack a class-action settlement at any time, no matter the adequacy of the notice it received prior to judgment or how long it has sat on its rights. Petitioner has thus cited no precedent that supports the position that it would have to establish to prevail here.

C. Seeking to bolster its unsupported claim, petitioner cites a few lower court cases allowing, as a matter of procedural law, post-judgment motions *to enforce* class-action settlements and judgments. *See* Pet. 28-29. Those cases provide no support for petitioner's position, and certainly provide nothing like a split of authority warranting review by this Court.

1. As an initial matter, petitioner seeks *to set aside* – not, as in the cases it cites, enforce – the judgment approving the settlement agreement. Petitioner's pleadings made clear its desire to invalidate the judgment and proceed with the litigation as if it had never been settled. *See* Supplement to Motion To Set Aside Settlement Agreement at 5 (Cameron Cty., Texas Dist. Ct. filed May 29, 2003) (contending that, as a result of the elimination of the Telecommunications Infrastructure Fund Board, "the settlement is 'void and of no effect' and should be 'treated as vacated'" and "urg[ing]" the trial court "*to set aside* the settlement agreement") (emphasis added); Chemject Int'l, Inc.'s Emergency Motion To Reconsider and Vacate the Court's Order of June 17, 2004 and Motion To Set a Hearing on Chemject's Motion To Set Aside Settlement Agreement at 11 (Cameron Cty., Texas Dist. Ct. filed July 14, 2004) (arguing that the trial court "must declare the Settlement Agreement and Judgment void *and return the parties to their status quo before the date of the settlement*") (emphasis added).

Furthermore, petitioner's suggestion (at 30) that the trial court could have enforced the agreement by setting it aside rests on a misinterpretation of the settlement agreement. Petitioner relies on the following language in the agreement:

> [I]f the settlement contemplated by this Agreement is not concluded substantially as described in this Agreement with an order of the Court approving the settlement, the Agreement and all other acts taken to effect a proposed settlement will be void and of no effect and will not be admissible by or against any Party to this Agreement.

Pet. App. 88. In petitioner's view, the elimination of the Telecommunications Infrastructure Fund Board meant that the settlement could not be "concluded substantially as described in th[e] Agreement" and, thus, the agreement should be considered "void and of no effect" in accordance with its terms. *Id.*; *see, e.g.*, Pet. 31.

Petitioner's claim founders on the plain language of the agreement, which makes clear that the parties intended the agreement to be void only if it was "not concluded substantially as described in th[e] Agreement *with an order of the Court approving the settlement*." Pet. App. 88 (emphasis added). Here, the trial court issued a final judgment approving the settlement agreement, *see id.* at 34-41, and that judgment was upheld on appeal. Thus, the agreement *was* "concluded substantially as described in th[e] Agreement with an order of the Court approving the settlement." No basis exists for invoking the provision on which petitioner relies.

Additionally, if (as petitioner suggests) the parties had intended the settlement to collapse if the

Telecommunications Infrastructure Fund Board was eliminated, they easily could have said so. For that matter, petitioner – which received notice of the settlement and had an opportunity to object to it (*see* Pet. App. 4) – could have raised this issue at the fairness hearing, or opted out of the settlement altogether. But it did not do so. Petitioner sat on its rights, and the Texas courts therefore properly rejected its belated attempt to unwind the final judgment approving the settlement.

In all events, the fact that petitioner's argument that its rights were violated rests on the particular language of this agreement confirms that the petition seeks to raise only case-specific issues that do not present a question worthy of this Court's plenary review.

Petitioner incorrectly claims (at 29-30) that *Perez v. Rent-A-Center, Inc.*, 892 A.2d 1255, *clarified on other grounds on denial of recon.*, 902 A.2d 1232 (N.J. 2006), *cert. denied*, 127 S. Ct. 984 (2007), supports its interpretation of the settlement agreement. The court there indicated only that the settlement in that case would have been void had it not been consummated, but said nothing about the type of event that might prevent consummation of the settlement. *See id.* at 1263. It thus sheds no light on the fact-bound issue of whether the elimination of the Telecommunications Infrastructure Fund Board implicates the validity of the settlement in this case. Moreover, the settlement agreement in *Perez* provided that the settlement would be void if it was "not consummated *for any reason whatsoever*." *Id.* (internal quotation marks omitted; emphasis added). In contrast to that broad language, the provision on which petitioner

relies would have applied only if the trial court did not approve the settlement.

2. Because petitioner seeks to set aside, not enforce, the judgment approving the settlement agreement, none of the authorities that it cites supports its due process claim.

Petitioner relies (at 28) on *Gates v. Cook*, 234 F.3d 221 (5th Cir. 2000), a civil rights class action brought by HIV-positive prisoners in Mississippi seeking injunctive relief from discriminatory conditions of confinement. *Id.* at 225. Counsel appointed to represent the class showed little enthusiasm for the task, *see id.* at 225 & n.1, and quickly reached a settlement with the defendants that provided little relief to the prisoners, *see id.* at 225-26. The district court entered a consent decree and retained jurisdiction to monitor compliance with its terms. *See id.* at 226. After four years in which the prisoners' conditions of confinement improved little, several class members requested to intervene in the litigation and filed a motion to substitute ACLU lawyers as class counsel (which was supported by at least 80 percent of the class). *See id.* at 226 & n.3, 229. The district court denied those requests and issued an order barring contact between the ACLU lawyers and the class members. *See id.* at 226.

The Fifth Circuit reversed both the no-contact order, which it held violated the class members' First Amendment rights, *see id.* at 227, and the denial of the substitution motion, explaining that class counsel's "nonfeasance" justified the "rare remedy of substitution," *id.* at 228. The court found it "unnecessary" to address the intervention motion, which also sought only to substitute the ACLU lawyers as class counsel. *Id.* at 228 n.6. The Fifth Circuit also

rejected the contention that the substitution motion was untimely, explaining that "such motions made during the ongoing administration of a class action settlement by a district court are not per se untimely." *Id.* at 228-29. As authority, the court cited *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), in which this Court held that unnamed class members could intervene for purposes of appealing a denial of class certification, where they did so within the time for filing an appeal. *See id.* at 395-96 & n.16.

Here, petitioner requested neither substitution of class counsel nor intervention within the appropriate time period for purposes of appealing the denial of class certification.[5] Instead, petitioner sought *to set aside the judgment*. Nothing in *Gates* or *McDonald* suggests that federal procedure would permit the relief petitioners seek, much less that the Due Process Clause requires such relief on the very different facts presented here, where there has been nothing like the extraordinary finding of "nonfeasance" by class counsel.

Nor does petitioner advance its cause by citing (at 28) *Kortebein v. American Mutual Life Insurance Co.*,

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[5] Nor would there have been any basis to substitute counsel. *See Northrup II*, 72 S.W.3d at 21 (noting with approval testimony that class counsel "was competent to perform its function"); Pet. App. 46 (finding that "the amount and nature of the discovery taken by class counsel was reasonable under the circumstances"), 47 (finding that "class counsel collectively have sufficient involvement, competency, and experience in class litigation to merit this Court giving some weight to their recommendation" that the trial court approve the settlement), 48 (finding that "the Action was hotly contested" and that "there was no collusion among counsel for the Settlement Class and counsel for [Southwestern Bell]").

49 S.W.3d 79 (Tex. App. 2001). Even if *Kortebein* (another Texas intermediate appellate decision) did conflict with the decision below, a division of authority within a State's intermediate appellate courts does not warrant this Court's review. *See* Sup. Ct. R. 10; *cf. Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

In any event, there is no conflict between the decision below and *Kortebein*. There, plaintiffs filed a nationwide class action against an insurance company in Texas state court. *See* 49 S.W.3d at 82. The parties settled the case and the court entered a final judgment. *See id.* at 82-83. Subsequently, an unnamed member of that class filed suit against the insurance company in Illinois asserting the same claims. *See id.* at 83-84. The insurance company asked the Texas trial court to enforce its judgment by enjoining the Illinois plaintiffs from proceeding with their suit. *See id.* at 84. The trial court issued the requested injunction, and the court of appeals affirmed, explaining that "[e]very court with jurisdiction to render a judgment has the inherent power to enforce its judgments." *Id.* at 88-89.

Unlike in *Kortebein*, petitioner does not seek to enforce the trial court's judgment approving the settlement agreement. Instead, it wishes to set aside that judgment.[6] *Kortebein* supports the result here,

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[6] Like *Kortebein*, *In re VMS Securities Litigation*, 145 F.R.D. 458 (N.D. Ill. 1992), *aff'd in relevant part, vacated in part*, 21 F.3d 139 (7th Cir. 1994), which petitioner also cites (at 28), holds only that a district court can enjoin attempts collaterally to attack a class-action judgment; it therefore does not support petitioner's due process claim.

insofar as it rejects an unnamed class member's attempt to upset a final judgment approving a settlement.

D. Finally, petitioner briefly asserts (at 30-31) that the court below denied it due process by concluding that its appeal was untimely to the extent it sought review of the trial court's May 2000 judgment approving the settlement agreement (*see* Pet. App. 9-10). That assertion also is unavailing.

It is well-settled that "the Federal Constitution guarantees no right to appellate review" in the first place. *M.L.B. v. S.L.J.*, 519 U.S. 102, 110 (1996) (citing *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (plurality opinion)).[7] To be sure, a State that chooses to provide appellate review cannot do so in a discriminatory manner. But Texas law, like federal law, generally requires appeals in civil cases to be filed within 30 days after entry of judgment. *See* Tex. R. App. P. 26.1; Fed. R. App. P. 4(a)(1)(A). Petitioner makes no attempt to explain how the application of that time limit to this case resulted in unconstitutional discrimination against it (nor could it). *Cf. Bowles v. Russell*, 127 S. Ct. 2360, 2366 (2007) (holding that federal courts of appeals lack jurisdiction to consider untimely appeals in civil cases).

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[7] *See National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37, 43 (1954) ("While a statutory review is important and must be exercised without discrimination, such a review is not a requirement of due process."); *see also McKane v. Durston*, 153 U.S. 684, 687 (1894) ("A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such a review. A citation of authorities upon the point is unnecessary.").

II. PETITIONER WAIVED THE OTHER ISSUES MENTIONED IN THE PETITION

Petitioner's questions presented include two additional issues – namely, (i) whether the trial court should have considered a request to remove the class representatives and class counsel, and (ii) whether the Fourteenth Amendment required the trial court to provide the absent class members with notice and an opportunity to be heard before deciding the parties' motion to establish a settlement administration. *See* Pet. i (Questions 1(b), 2). Neither of those issues was properly presented to, or passed on by, the Texas court of appeals. *See* Pet. App. 7-11; Pet'r Ct. App. Br.[8] Therefore, the issues are not properly presented for this Court's review. *See, e.g.*, *Howell v. Mississippi*, 543 U.S. 440 (2005) (per curiam) (dismissing the writ as improvidently granted where the question was neither presented nor passed on in the state court); *Adams v. Robertson*, 520 U.S. 83 (1997) (per curiam) (same). Moreover, even if those issues had been presented and passed on below, petitioner failed to discuss them in the body of the petition. *See* Pet. 27-35; *see also* Sup. Ct. R. 14.4 ("The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition.").

Similarly, petitioner fleetingly mentions a claim that the trial court violated petitioner's rights under the Equal Protection Clause by granting the motion

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[8] *See also Moser v. Roberts*, 185 S.W.3d 912, 916 (Tex. App. 2006) (refusing to consider an argument that was not supported "with clear and concise arguments"); Tex. R. App. P. 38.1(h) (a party's brief "must contain a clear and concise argument for the contentions made, with appropriate citations to authorities").

to establish a settlement administration filed by Southwestern Bell and the class representatives, but denying petitioner's motion to set aside the judgment. *See* Pet. 31. That claim of disparate treatment – which appears only in a paragraph without supporting authority – was neither raised nor decided below. *See* Pet. App. 7-11; Pet'r Ct. App. Br. It therefore is not properly presented here. *See Howell*, 543 U.S. 440; *Adams*, 520 U.S. 83.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

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[9] Moreover, the equal protection claim lacks merit. The trial court treated petitioner's filings different from respondents' motion because it had jurisdiction to address and grant respondents' motion but lacked jurisdiction to consider petitioner's motion to set aside the final judgment. "Equal protection does not require that all persons be dealt with identically" (or that all motions be granted no matter how far-fetched); rather, it requires only "that a distinction made have some relevance to the purpose for which the classification is made." *Baxstrom v. Herold*, 383 U.S. 107, 111 (1966). Abiding by jurisdictional limits does not violate equal protection.

Respectfully submitted,

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